

01  
02  
03  
04  
05  
06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 JOSEPH AGEE, ) CASE NO.: C08-0429-RSL  
09 )  
Petitioner, )  
10 )  
v. ) ORDER DENYING PETITIONER'S  
11 ) MOTION FOR STAY  
JEFFREY UTTECHT, )  
12 )  
Respondent. )  
13 \_\_\_\_\_ )

14 Petitioner is a state prisoner who has filed a *pro se* petition for a writ of habeas corpus  
15 pursuant to 28 U.S.C. § 2254. On October 10, 2008, the Court issued a Report and  
16 Recommendation ("R&R") that recommended dismissing the petition without prejudice because  
17 petitioner's claims were unexhausted. (Dkt. No. 21). On December 17, 2008, petitioner filed a  
18 motion to stay consideration of the R&R while petitioner returned to state court to exhaust his  
19 remedies. (Dkt. No. 27). Respondent filed a response to the motion for a stay and the matter has  
20 been referred to the Court. (Dkt. No. 29). Having reviewed the motion for a stay, the response,  
21 and the balance of the record, the Court does hereby find and ORDER as follows:

22 (1) Petitioner states that he has filed a personal restraint petition in state court in order

01 to exhaust his claims. (Dkt. No. 27 at 1). By taking this action, petitioner appears to be tacitly  
02 conceding that the claims he presented in his habeas petition are all unexhausted. In order to  
03 qualify for a stay, however, petitioner's habeas petition must be a "mixed" petition, *i.e.*, it must  
04 include at least one claim that has already been exhausted. *See Rhines v. Weber*, 544 U.S. 269,  
05 275-77 (2005). Because petitioner's habeas petition contains only unexhausted claims, he does  
06 not qualify for a stay. Accordingly, petitioner's motion for a stay (Dkt. No. 27) is DENIED.<sup>1</sup>

07 (2) The Clerk shall send a copy of this Order to petitioner, counsel for respondent, and  
08 the Honorable Robert S. Lasnik.

09 DATED this 21st day of January, 2009.

10   
11 Mary Alice Theiler  
12 United States Magistrate Judge  
13  
14  
15  
16  
17  
18  
19

---

20 <sup>1</sup> As respondent notes in his response to the motion for a stay, if petitioner's personal  
21 restraint petition has been properly filed in state court, then the running of the federal statute of  
22 limitations will be tolled during the pendency of the state court petition. *See* 28 U.S.C. §  
2244(d)(2). Thus, petitioner should be able to return to federal court to present his claims in a  
habeas petition once his petition in state court has been fully resolved.